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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 505.

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE, and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners,

—against—

CHARLES ARMBRECHT; GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of Jules S. Bache, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION OF CARL J. AUSTRIAN AND ROBERT G. BUTCHER, AS TRUSTEES OF CENTRAL STATES ELECTRIC CORPORATION, A DEBTOR IN REORGANIZATION, FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

AND BRIEF ON BEHALF OF TRUSTEES OF CENTRAL STATES ELECTRIC CORPORATION.

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ISADORE H. COHEN,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Motion for Leave to File Brief as *Amici Curiae.*

To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as attorney for and on behalf of Carl J. Austrian and Robert G. Butcher, Trustees of Central States Electric Corporation, a Debtor in reorganization proceedings under Chapter X of the Bankruptcy Act, respectfully moves this Honorable Court for leave to file the accompanying brief as *amici curiae.*

Central States Electric Corporation is a Debtor in reorganization proceedings in the District Court for the Eastern District of Virginia. Some time in 1943, the former Trustees of the Debtor reported to the District Court that numerous wrongs and frauds had been perpetrated against the estate of the Debtor by certain persons, firms and corporations. They recommended, however, that no suit be instituted to redress these frauds because, in their opinion, the statutes of limitation of the states where suit could be instituted barred any relief.

The Court of Appeals for the Fourth Circuit did not agree with these views (see *Committee for Holders of Central States Electric Corp., etc.* v. *Kent, etc.*, 143 Fed. (2) 684) and an investigation was made by the present Trustees of the Debtor. As a result of that investigation an action was instituted in the District Court for the Southern District of New York to redress the wrongs and frauds done to the Debtor (see *Austrian, et ano.* v. *Williams, et al.*, civil action file #32-149).

In that action the defendants moved to dismiss the complaint on the ground, *inter alia*, that the only applicable statute of limitations was that of the State of New York and that under that statute the action was barred. This motion is pending decision. In the defendants' arguments and briefs the decision of the Court of Appeals for the Second Circuit in *Holmberg* v. *Armbrecht*, 150 Fed. (2) 829, was cited as holding that in *any* suit in a United States district court, the state statute of limitations is controlling regardless of the existence of any special circumstances.

Because a decision of that question in this case may have an important bearing on the litigation of the Trustees of Central States Electric Corporation, we deemed it appropriate to make this application for leave to intervene herein as *amici curiae* and submit the accompanying brief setting forth our views on the question involved in this case.

Counsel for petitioners have consented to the filing of this brief. Counsel for respondents have been requested to consent, but have refused.

January 8th, 1946.

SAUL J. LANCE,
Attorney for Carl J. Austrian and Robert G. Butcher, Trustees, amici curiae.

ISADORE H. COHEN,
Of Counsel.

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BRIEF FOR CARL J. AUSTRIAN AND ROBERT G. BUTCHER, AS TRUSTEES OF CENTRAL STATES ELECTRIC CORPORATION, DEBTOR, *AMICI CURIAE.*

Opinions Below.

The opinion of the United States District Court (R. 99)* has not been reported; the opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 113) is reported in 150 Fed. (2) 829.

* At the date of writing the record to be used in this Court had not yet been printed and was, accordingly, not available to us. The references we have used are to the pagination of the record on which the writ of certiorari was granted.

Jurisdiction.

The order and judgment of the Court of Appeals for the Second Circuit was filed July 13, 1945 (R. 122). The petition for a writ of certiorari was filed October 1945 and was granted on November 19, 1945 (R.). The jurisdiction of this Court rests upon Judicial Code §240(a), 28 U. S. C. §347(a), as amended by the Act of February 13, 1925.

Question Presented.

We do not agree with either the petitioners or the respondents in the statement of the question deemed to be presented by this record.

We think that the fundamental error of the Court of Appeals lies in its view of the scope of the decision of this Court in *Guaranty Trust Co.* v. *York*. The Court of Appeals took the *York* case as stating an ironclad rule that state statutes of limitation applied in all suits instituted in the federal courts, whether at law or in equity and regardless of the circumstances of the particular case. The Court of Appeals disregarded the *caveat* of this Court in the *York* case to observe, where proper, the "considerations relevant in disposing of questions that arise when a federal court is adjudicating a claim based on a federal law".

As a result the Court of Appeals

1. failed to consider the proper date when the assessment liability accrued—a federal question;

2. failed to investigate the existence of special circumstances alleged to affect the application of the state statute of limitations because it assumed

that in every federal equity suit, even one not based on diversity of citizenship, the doctrine of *Kirby* v. *Lake Shore etc. R.R. Co.* was no longer applicable;

3. failed to investigate the policy of the federal statute as bearing on the running of the state statute of limitations in cases of concealed ownership of stock of a federal land bank—a federal question.

In all of these circumstances the Court of Appeals erred as we now shall show.

Statement of the Case.

The Southern Minnesota Joint Stock Land Bank of Minneapolis closed its doors on May 2, 1932 (R. 34). This action was commenced in the District Court for the Southern District of New York by the service of process on the defendants[1] on November 17 and 18, 1943 (R. 1) to recover an assessment from Charles Armbrecht and Jules S. Bache, two stockholders of the Southern Minnesota Joint Stock Land Bank of Minneapolis (R. 19). The liability of Armbrecht is predicated on the registration of the stock in his name on the books of the bank. The liability of Bache rests on his ownership of the same block of 100 shares—Armbrecht being merely a nominee of the same shares. The facts that the bank closed its doors on May 2, 1932 and is now, and has for some indeterminate time, been insolvent (R. 19); the status of Armbrecht and Bache as nominal and real owners of the 100 shares of stock involved; and the necessity for an assessment

[1] Defendant Bache died on March 24, 1944; by stipulation his executors were substituted as parties defendant (R. 1, 2).

up to the full par value of $100 per share (R. 35), are not disputed. Dispute centers entirely around the question of the timeliness of the commencement of the action. Both Armbrecht and Bache pleaded the ten year New York statute of limitations as a bar to the suit (R. 16).

The record shows, and it is conceded on all sides, that in the liquidation in Minnesota a suit was instituted on July 28, 1932 to establish the necessity of the assessment and in that suit a decree was rendered on April 20, 1935 finding that the bank was insolvent, that its liabilities exceeded its assets to the extent of $4,264,687.39, "and that an assessment of 100% against all stockholders was necessary" (R. 34, 35, 46). Thereafter, and on October 19, 1935, a notice was mailed to Armbrecht advising him of his liability for the assessment and making demand for payment (R. 54, 101).

In the District Court and in the Court of Appeals the issue of the application of the New York statute of limitations was posed in terms of the scope of the rule in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, as explained in *Russell* v. *Todd*, 309 U. S. 280, and *Guaranty Trust Co.* v. *York*, 89 L. Ed. 1418. Since the action was, of necessity, brought in equity (*Wheeler* v. *Greene*, 280 U. S. 49), and since the underlying right, the cause of action for the assessment liability, was created by federal statute (12 U. S. C. §812) the District Court held that a state statute of limitations "was not recognized law" in the federal court (R. 103). The Court of Appeals held to the contrary. It pointed out that *where a state created right was being enforced*, under the rule in *Guaranty Trust Co.* v. *York* "there should be no distinction in

limitation periods in diversity cases between those arising under the federal court's equity powers and those arising in law * * *" (R. 119); that "no sound reason is offered why such a distinction should be made when, as here, *the right sought to be enforced is created by a federal statute* * * *" (R. 120; emphasis supplied), and that, accordingly, it was "unnecessary" to review the facts involved in the claimed inequitable conduct of Bache (R. 117)—it being the petitioners' contention that such facts rendered the state statute of limitations inapplicable.

This holding by the Court of Appeals is grounded on the assumption that the cause of action accrued on May 2, 1932—the date when the bank closed. If that is error and the cause of action did not accrue until April 20, 1935, the date of the Minnesota decree declaring the necessity for an assessment, then the order and judgment of the Court of Appeals must be reversed for the action would not have been barred on November 18, 1943, even if the New York ten year statute of limitations applies.

Therefore, the first question presented by the record is: when did the assessment liability accrue?

I.

The action was not barred because the cause of action accrued on April 20, 1935.

The Court of Appeals assumed that the date when the cause of action accrued was May 2, 1932, the day the bank closed its doors.[2] We do not agree. We believe that the cause of action accrued *at the earliest*

[2] Thus, the Court of Appeals, in the course of its opinion, referred to the fact that the action was commenced "eleven and one-half years after the bank's failure * * *" (R. 116).

on April 20, 1935,[3] the date of the decree in the Minnesota liquidation declaring the necessity for an assessment. On that basis the cause of action was only eight years old and was not barred in November, 1943. The judgment of the District Court therefore should have been affirmed on the ground set out in *Russell* v. *Todd*, 309 U. S. 280, 294.[4]

The statute (12 U. S. C. §812) which creates the liability of the stockholders of a federal land bank for an assessment, does not fix the date when the cause of action to recover the assessment accrues. This Court has not yet passed on the precise point, although it has, inferentially, at least, indicated that the date when the assessment liability accrues is not necessarily coincident with the date of the closing of the bank.[5] The question is therefore open.

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[3] In the Court of Appeals counsel for defendants stated that "the bank failed on May 2, 1932. The cause of action accrued on that date. * * *". (*Brief for appellants in Court of Appeals, p. 7.*) The only authority cited was a statement to that effect by Woolsey, *D. J.*, in *Holmberg* v. *Anchell*, 24 F. Supp. 594, 601, which, in turn, cited no authority. * * * *Melius est petere fontes quam sectari rivulos.*

[4] "* * * but in this case laches has not been held to be a defense and the Court has not declined to give effect to a state statute shown to be applicable. * * *"

[5] In *Russell* v. *Todd*, 309 U. S. 280, the bank closed on September 1, 1927. On April 6, 1928 the Federal Farm Loan Board made a determination of insolvency and levied an assessment and gave notice thereof. Although *Wheeler* v. *Greene* established that the Federal Farm Loan Board had no authority to levy the assessment, nevertheless, the District Court in the *Todd* case found that the liability accrued not on the date the bank closed, but on April 6, 1928, the date the Farm Loan Board levied the assessment. Chief Justice Stone mentioned in passing in his opinion in *Russell* v. *Todd*, that it was "conceded" that the cause of action accrued on April 6, 1928 (309 U. S. 280, at p. 284). We do not claim that *Russell* v. *Todd* is a decision as to when the cause of action for the assessment accrued, but at least it is an indication that the date of accrual does not coincide with the date the bank closed its doors.

The liability of the stockholders of a federal land bank for an assessment is created by a federal statute (12 U. S. C. A. §812). The scope and extent of this liability is governed entirely by federal law—state law is irrelevant. (*Rankin* v. *Barton*, 199 U. S. 228, 232; *Christopher* v. *Norvell*, 201 U. S. 216, 225; see *Forrest* v. *Jack*, 294 U. S. 158, 162; cf. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 284.) Accordingly, the question of the date of accrual of the liability of the defendants in this case must be determined by considerations relevant to the effectuation of the policy inherent in this federal statute. (*Rawlings* v. *Ray*, 312 U. S. 96.)

What is this policy? Obviously it is to provide an additional fund to pay the claims of creditors if the federal bank is insolvent and the total amount of its assets is insufficient to pay its liabilities. Payment of creditors is effected in a liquidation which follows the closing of a bank. The aim of such a liquidation of a closed bank is to marshal the assets, reduce them to cash and to make pro rata distribution amongst the creditors. A liquidation may result in full payment of all claims or it may result in a deficit. Only in the latter event does an assessment become necessary.

Obviously the liability for the assessment cannot accrue until the necessity therefor is established. The mere closing of the bank does not establish this. The bank may then be solvent. Insolvency may occur only sometime later and, indeed, may have its origin in some event subsequent to the closing of the bank, such as the bankruptcy of a substantial debtor or the de-

preciation in the value of its assets. It is easily conceivable, in the case of a bank whose assets are largely rested on local land values, that a poor crop, unfavorable weather or adverse market conditions could destroy assets entirely or render them nearly worthless.

If there is a deficit on the date of the closing of the bank, there is still no certainty on that date of the amount of the deficit. That will appear only in the course of the liquidation.

Even if the bank had been insolvent when it closed its doors, a rise in land values, together with a wise administration of the estate, could restore the assets to a point where solvency would be re-established.

A determination of the date of the accrual of the assessment liability will thus be seen to have a direct bearing on one of the fundamental objects of the federal statute—the amount which can be salvaged for creditors in the event of insolvency. If this date is arbitrarily fixed before there is an opportunity to determine the necessity for an assessment then it may result, in particular cases, in the destruction of the assessment liability and consequently in the frustration of the congressional policy evidenced by the statute. The only way to effectuate this policy is to establish a rule in the case of land bank liquidations that the cause of action on the assessment is deemed to accrue in each instance on the date when a decree is made in the liquidation that an assessment is necessary.

The liquidations of national and state banks furnish a fund of experience from which can be obtained the materials to fashion a workable rule for land banks. In an involuntary liquidation of a national bank, the determination of the necessity for an assessment and the amount thereof, is made by the Comptroller of the

Currency.[6] The cause of action accrues on the date the Comptroller declares the assessment to be due and payable.[7] This necessarily occurs sometime after the bank is closed and when the necessity for an assessment becomes clear. In leaving the determination of the necessity for an assessment to the Comptroller, the Congress has plainly shown that in its opinion this is an administrative matter to be determined as an incident of liquidation and governed by the peculiar facts of each separate liquidation.[8]

New York has a statute which was originally patterned on the federal statutes. The same experience is disclosed in the New York cases. There too the legislature was content to leave the fixing of the necessity for an assessment and the amount thereof to the State Superintendent of Banks.[9]

Congress could have expressly stated that in all instances the assessment liability in the case of federal land banks accrued on the date the bank closed. But it did not do so. And the reason lies in the nature of the liability. It is uncertain on the day the bank closes whether an assessment will be necessary; it is uncertain what the amount of the deficit will be. The experience gained in the liquidation of state and national banks shows that the assessment liability is an incident of liquidation and that the necessity for the liability, its amount, and the time of accrual vary in each case.

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[6] *Adams* v. *Nagle*, 303 U. S. 532 (1938).

[7] *Rawlings* v. *Ray*, 312 U. S. 96 (1941).

[8] In *Adams* v. *Nagle*, 303 U. S. 532, 540, the Court said, "* * * The necessity for vesting this power in an administrative officer springs from the desirability of prompt liquidation. It would be intolerable if the Comptroller's decision could be attacked collaterally in every suit by a receiver against the shareholders to collect the amount of the assessment. It is settled this cannot be done. * * *"

[9] New York Banking Law, Sections 632, 113a.

A moment's reflection will show the propriety of this view of the assessment liability. When a bank closes and a new management takes over for purposes of liquidation, there is a certain chaotic period which almost always exists before the liquidation is set on its proper course. New people have to familiarize themselves with the bank's business, its affairs, the prospects of its debtors and the amount of its liabilities. At this stage of the liquidation the liquidators have to direct their entire attention to the organization of the liquidation. They are not ready to consider such matters as the enforcement of an assessment. It is only after the initial chaos has been resolved and a study has been made of the affairs of the bank that some appraisal can be made of the value of the assets as against the amount of the liabilities.

Even then great dispute and contrariety of opinion will exist. After all, solvency is a conclusion which is derived from a series of guesses as to the probable amounts which can be recovered from the bank's debtors; an appraisal of the value of security held by the bank for debts owing to it as this may be affected by conditions peculiar to the type of such security; a determination of the probable amount of its liabilities. Finality sufficient to determine the necessity of an assessment and the amount thereof cannot be reached until the liquidation has proceeded to a point where the liquidators are in a position to make a determination with respect to all these elements.

In the case of a national bank such a determination is made by the Comptroller. In the case of a New York bank the determination is made by the State Superintendent. In the case of a federal land bank where no provision has been made for a liquidator

comparable to the Comptroller or the Superintendent of Banks, the determination must be made by a court. Obviously, the same considerations pertaining to the determination of the necessity for an assessment when the liquidation is under the control of an executive agency are equally applicable when the liquidation is under the supervision of a court.

In this case the determination for the necessity and amount of the assessment was made by the District Court for the Minnesota District in which the liquidation proceeding was pending. That Court, as an incident of the liquidation, determined that an assessment was necessary in order to restore a deficit of some four million dollars. Then, for the first time, did the assessment liability become fixed. That was the date when the liability accrued. That date was April 20, 1935—less than ten years before the action against the defendants was commenced.

To prove that the statute of limitations should not begin to run on the cause of action for the stock assessment liability of the stockholders of this land bank until April 20, 1935, we shall turn to the cases which have arisen in connection with the *voluntary* liquidations of national banks. A consideration of these cases is decisive for two reasons. First, the statutes dealing with the respective stock assessment liabilities of stockholders of national banks in voluntary liquidation and the liability of stockholders of federal land banks are practically identical and create the same procedures and problems; second, both statutes were enacted by Congress. Moreover, the federal land bank statute was passed in 1916, 40 years *after* the one applicable to assessments of stockholders in the case of voluntary liquidations of national banks. If, therefore, it was held in connection with the na-

tional bank statute that the statute of limitations did *not* begin to operate until there was a decree of the Court in which the liquidation was pending fixing the necessity for an assessment, it follows that Congress must have intended the same construction in the case of joint stock land banks.[10] Certainly no reason can be suggested in view of the *identity* of the statutes and procedures provided in *both* cases why the same result as to the operation of the statute of limitations should not be followed.

That the statutes are identical will appear from the following comparison:

National Banks	*Land Banks*
12 U. S. C. §63.	12 U. S. C. §812.
The shareholders of every national banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; * * *.	Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares.

[10] Cf. the analogous argument as to the interpretation of other statutes enacted by Congress in *Exploration Co.* v. *U. S.*, 247 U. S. 435 (1918).

National Banks

12 U. S. C. §65.

When any national banking association shall have gone into liquidation under the provisions of section 181 of this title, the individual liability of the shareholders provided for by section 63 of this title may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

Land Banks

The same procedure created by statute (12 U. S. C. §65) *for national banks was established judicially with respect to land banks by the decision in Wheeler* v. *Greene,* 280 U. S. 49.

When a national bank has gone into voluntary liquidation and an assessment against its stockholders becomes necessary, the local statute of limitations applicable to assessments does not begin to run until the necessity for an assessment has been judicially decided in an action instituted in the state where the national bank is located.

Thus, in *King* v. *Pomeroy,* 121 Fed. 287 (C. C. A. 8th 1903) the national bank went into voluntary liqui-

dation on April 6, 1891, at which time it was completely insolvent. On April 13, 1891, a creditor filed a bill praying for the appointment of a receiver of the assets and creditors of the bank. This relief was granted and the receiver entered upon his duties. In December 1898 he reported that unpaid liabilities of the bank existed in an amount in excess of $36,000 and he asked for directions with respect to the enforcement of the stockholders' liability. In the same suit a creditor intervened and asked the Court to declare the necessity of an assessment against the stockholders and appoint a receiver to collect the assessment. On February 12, 1900, the Court made an interlocutory decree in which it found that there was a necessity for an assessment to the extent of 38.84% of the par value of the stock. An action was then brought to recover from the defendant Pomeroy, a stockholder in the bank, the assessment so levied. The Circuit Court dismissed the bill resting its decision in part on the ground that the action was barred by the three year statute of limitations of the state of Kansas. In reversing the judgment below the Court of Appeals, per Sanborn, *J.*, said (at p. 297):

> "Another reason why this action ought not to be maintained is pressed upon our attention. It is that it was barred by the limitation of three years prescribed by the Code of Civil Procedure of Kansas, art. 3, § 18, subd. 2. This contention rests upon the argument that the bar of the statute cannot be postponed by the failure of a creditor to avail himself of any means within his power to prosecute or preserve his claim (*Bauserman* v. *Blunt*, 147 U. S. 657, 13 Sup. Ct. 466, 37 L. Ed. 316), and that the creditors were aware of the insolvency of the bank, and hence of the liability of its stockholders, and could have com-

menced their suit to enforce it as early as April 13, 1891; when the bill for the appointment of the receiver was filed. But the answer to this objection is that the suit to administer the affairs of the bank, commenced in 1891, was, like the proceedings of the comptroller in cases within his jurisdiction, a proceeding to ascertain and enforce the liability of the shareholders as well as to administer the tangible assets of the bank, because that ascertainment and enforcement was a part of the liquidation contemplated, so that no time ran against the creditors during the pendency of that proceeding.

* * * The result is that the cause of action which the receiver is now prosecuting in the case before us never accrued until 60 days after February 12, 1900, when the court ascertained the necessity, and ordered the payment of the 38.84 per cent of the par value of the stock 60 days after that date. There was no time prior to the order of February 12, 1900, when the extent of the liability of the shareholders of this bank was ascertained; no time when it was due. There was no time after April 13, 1891, when the suit in equity to liquidate the affairs of the bank was commenced when any creditor could have maintained a bill to enforce the liability of the shareholders, because the jurisdiction of the court which had already seized the assets and commenced to liquidate the obligations of the bank was exclusive. The result is that the bar of the statute has not arisen and this action may be maintained under the general rule that, in an action by a receiver to enforce the liability of a shareholder of an insolvent national bank whose affairs are in course of judicial administration in a proper proceeding in a federal court for the purpose of liquidating its debts, the liability of the shareholders of the bank does not

become due, does not mature, and the action to collect it does not accrue, until the court decides that it is necessary to collect some part of it, determines the amount, and fixes the time for its payment. *Deweese* v. *Smith,* 106 Fed. 438, 441, 45 C. C. A. 408, 410, 411, and cases there cited."

In *Hall* v. *Ballard,* 90 Fed. (2nd) 939 (C. C. A. 4th 1937), a national bank went into voluntary liquidation on May 20, 1926. On May 24, 1929 two creditors obtained judgments against the bank. Executions thereon were returned unsatisfied on August 22, 1929. On August 16, 1930, the judgment creditors filed an equity bill in the United States District Court against the stockholders to enforce their stock assessment liability. On July 17, 1934, a decree was rendered adjudging the stockholders liable for an assessment to the extent of the full par value of the shares owned by each of them and the receiver was directed to collect the assessment liability from the stockholders who were not served in the main equity bill. Action was then begun on July 25, 1935 against Ballard, a stockholder of the bank, to recover the assessment liability from him. Ballard pleaded that the action was barred by the statute of limitations of the State of West Virginia, and the district court sustained the plea. In reversing the judgment below the Court said (at p. 944):

"Therefore, the cause of action against appellee here never accrued until July 17, 1934, the date upon which the United States District Court for the Western District of Virginia, first ascertained the necessity and ordered the payment of 100 per cent. of the par value of the stock and appointed Leonard R. Hall receiver, who was ordered and directed on that date to collect the shareholders'

liability not to exceed $100 for each share owned by them.

Counsel for appellee contend, however, that the cause of action to enforce the individual liability of the stockholders of the Peoples National accrued on August 22, 1929, the date on which executions against the Peoples National were returned unsatisfied, that on that date the creditors were aware of the insolvency of the bank and the consequent liability of its stockholders, and an action could have been commenced on that date to enforce such liability, and rely for such contention upon the case of *Warner* v. *Citizens' Nat. Bank* (C. C. A.) 267 F. 661.

> It is true that liquidation and insolvency transform the potential liability of shareholders into one presently enforceable. * * * If the Comptroller of the Currency liquidates the bank, the liability is enforceable upon his direction by the suit of the receiver, and the cause of action accrues when the Comptroller makes the assessment and fixes the time for its payment. If the bank is in the course of voluntary liquidation the liability is enforceable by a suit in equity in the nature of a creditor's bill, and the right to bring such creditor's bill accrues when insolvency becomes manifest. * * * But, the statute of limitations does not begin to run in favor of the stockholder upon the insolvency of the bank, except, by analogy, as to the suit in equity to determine the amount of the liability."

It may be argued that the decision in *Christopher* v. *Brusselback*, 302 U. S. 500, is opposed to the conclusion of these cases. All that that case decided however was that as to land banks the decree in the liquidation suit has no extraterritorial force. This result simply requires that in states outside of the liquidation state

insolvency must be re-proved. But that does not alter the general rule that the date of accrual of the assessment liability is the date when in the liquidation proceeding it is determined that an assessment is necessary to pay the claims of creditors.

King v. *Pomeroy* and *Hall* v. *Ballard* show that the proper date of the accrual of the assessment liability of stockholders of land banks is that fixed by judicial decree in the liquidation proceeding of the bank. In the instant case that date, as fixed by the Minnesota Court, was April 20, 1935. The action having been brought in November, 1943 was therefore not barred by the New York ten year statute of limitations.

II.

In holding that the state statute of limitations must be applied regardless of any other circumstances, the Court of Appeals erred:

(a) in failing to consider and give effect to the policy of the federal statute involved; and

(b) in assuming that in all equity cases in a federal court special circumstances are no longer relevant in determining the staleness of the claim asserted.

If this Court should hold that the cause of action on the assessment liability accrued on May 2, 1932, the date of the closing of the bank, then the scope of the decision in *Guaranty Trust Co.* v. *York* becomes of paramount importance. In the *Guaranty* case the right involved was *state-created,* and the case came to the federal court solely by virtue of the diversity of citizenship of the parties. In the *present* case the right is federally created but it is not clear whether

the jurisdiction of the district court is based on diversity of citizenship or on the existence of a federal question.

While the Court of Appeals adverted to the fact that jurisdiction was here invoked on the ground of diversity of citizenship of the parties as well as the existence of a federal question, it did not go farther into the matter. The scope of its holding is thus uncertain. We do not know whether the Court of Appeals viewed the district court's jurisdiction as being *solely* grounded on diversity of citizenship, or whether it viewed the federal question involved as a sufficient ground in and of itself. It may be—we do not know—that the Court of Appeals felt that the diversity of citizenship of the parties furnished the *sole* basis for federal jurisdiction in this case, and that the instant case was essentially the same as the one presented in *Guaranty Trust Co.* v. *York*—both cases coming to the federal court solely on diversity grounds. Some basis for this view may be found in the Court's emphasis on the fact that the only distinction between this case and the *Guaranty* case was the difference between the sovereignties which created the right, in the *Guaranty* case, it being a state right which was being enforced, in the instant case, a federal right.

Clearly, it can be seen that there is a probability, in view of the decisions of this Court in *Erie R. Co.* v. *Tompkins*, *Russell* v. *Todd* and *Guaranty Trust Co.* v. *York*, that the nature of the federal jurisprudence involved may differ depending on the source of its jurisdiction. Since the *Tompkins* case, as subsequently expounded, has drawn a sharp cleavage between a *primary* federal jurisprudence and a *secondary* jurisprudence when the federal courts are merely

sitting as alternative substitutes for a state tribunal, it is of paramount importance, in order to understand the issues presented, to determine in what capacity the federal court is acting in a particular case, and whether it is expounding a primary federal jurisprudence or whether it is simply sitting as a substitute for a state tribunal and automatically applying state law.

Under this posture of the case we believe that the record requires the decision of the following questions:

(1) Is the federal court here exercising a jurisdiction primarily "federal" and thus expounding a "federal" jurisprudence? In such a case, in the absence of a federal statute of limitations is the court when passing on a case of equitable cognizance absolutely bound in all cases and without regard to special circumstances by a state statute of limitations? In other words, is the entire content of the ancient equitable doctrine of laches and of the ancient equitable bill to relieve against fraud or inequitable conduct removed from federal jurisprudence?

(2) Is the federal court exercising a jurisdiction primarily derivative—that is, one conferred solely by reason of the diversity of citizenship of the parties—and in that event is the rule in *Guaranty Trust Co.* v. *York* altered by the fact that the basic right here involved is federally created?

From the date of the decision in *Campbell* v. *Haverhill,* 155 U. S. 610 (1895) it has never been doubted that when Congress creates a right without at the same time specifying any applicable period of

limitation, all courts—federal as well as state—will apply the state statute of limitations locally applicable to the same or similar state created rights or causes of action.[11] In diversity suits in federal courts, state limitation statutes were held to be "rules of decision" within §34 of the Judiciary Code of 1789, and as such apply in "trials at common law".[12] But it was also never doubted that, in a proper case, a federally created period of limitation would override any state statute of limitation.[13]

And since the date of the decision in *Bailey* v. *Glover,* 21 Wall. 342 (1874), it has never been doubted that a federal statute of limitations would not begin to run in cases of concealed fraud or other inequitable conduct until the discovery of the facts relative to the fraud.

In *Bailey* v. *Glover, supra,* an assignee in bankruptcy filed a bill against the defendants to set aside certain fraudulent conveyances. The bill alleged that the defendants had kept their fraudulent acts secret and concealed them so that the facts were not discovered until within two years of the bringing of the bill. The defendants demurred on the ground that

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[11] *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U. S. 390 (1906); *McDonald* v. *Thompson,* 184 U. S. 71 (1902); *O'Sullivan* v. *Felix,* 233 U. S. 318 (1914); *McClaine* v. *Rankin,* 197 U. S. 154 (1905); *Brady* v. *Daly,* 175 U. S. 148, 158 (1899); *L. & W. R. R.* v. *Gardiner,* 273 U. S. 280, 284 (1927).

[12] *Guaranty Trust Co.* v. *York,* 89 L. Ed. 1418, 1424, 1425, citing *M'Cluny* v. *Sullivan,* 3 Pet. 270; *Bank of Alabama* v. *Dalton,* 9 How. 522; *Leffin well* v. *Warren,* 2 Black 599; *Bauserman* v. *Blunt,* 147 U. S. 647.

[13] *Herget* v. *Central National Bank & Trust Company,* 324 U. S. 4 (1945); *Callahan* v. *Bailey,* 293 N. Y. 396; *Isaac* v. *Necce,* 75 Fed. 2nd 566 (C. C. A. 5th 1935); *Devoy* v. *Superior Fire Insurance Co.,* 239 App. Div. 28 (1933); *Engebretson* v. *West,* 133 Neb. 846 (1938); *Fuller* v. *Rock,* 125 Oh. St. 36 (1932); *Rock* v. *Bennett,* 155 Mass. 500 (1892); *Sheldon* v. *Parker,* 66 Neb. 610 (1902).

the action was barred by the two year statute of limitations contained in the Bankruptcy Act of 1867. In reversing the decree entered for the defendants on the demurrer, the Court said (at p. 347):

> "But the appellant relies in this court upon another proposition which has been very often applied by the courts under proper circumstances, in mitigation of the strict letter of general statutes of limitation, namely, that when the object of this suit is to obtain relief against a fraud; the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it. * * *"

(at p. 349):

> "* * * And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.
>
> While we might follow the construction of the State courts in this matter, where those statutes governed the case, in construing *this* statute of limitation passed by the Congress of the United

> States as part of the law of bankruptcy, we hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him."

This perspective has important overtones and implications: for what the Court was applying in *Bailey* v. *Glover* was, as the Court itself made plain, an ancient equitable power: the power contained within the old bill to relieve against fraud or inequitable conduct. Before the union of law and equity initiated by the Field Code about a century ago, it was a commonplace of the then current legal thinking that, in an action in a court of law, fraud or other inequitable conduct was no answer to a defense of limitations.[14] But if the defendant had caused the running of the statute by his own inequitable conduct, the plaintiff could obtain relief from the chancellor.[15]

The Field Code, and the codes generally, carried over this equitable power. And in the unitary code cause of action, the relief formerly obtained by way of the bill to relieve against fraud and inequitable conduct could be obtained and given effect by pleading in replication to a defense of limitations the same

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[14] *Troup* v. *Smith*, 20 John. 33 (1822); *Allen* v. *Mills*, 17 Wend. 202 (1837).

[15] *Bertine* v. *Varian*, 1 Edw. Ch. 343, 347, 348 (1832). In New York, the chancellor's power was cast into statutory form even before the adoption of the codes. As early as 1829, the New York revised statutes (2 R. S. (1829) P. 301, Sec. 51) provided:

> "Bills for relief, on the ground of fraud, shall be filed within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time."

facts which would, before 1848, have moved the chancellor to issue his injunction against the pleading of a defense of limitations at law.[16]

The rule in *Bailey* v. *Glover, supra,* was merely an application *in the federal courts* of this historical remedy applied with respect to a federal statute of limitations.

With this background, it thus becomes easier to understand the true doctrine of laches in the federal courts. Before the union of law and equity, limitations did not apply *ex proprio vigore* in chancery. The doctrine of laches furnished the measure of time in actions in chancery. In ordinary cases, the chancellor would, in looking for the time-content of laches, accept the period otherwise applicable to the cause of action if the suit were brought at law.[17] But, just as he would not tolerate a defense of limitations at law where it would be inequitable to permit it, so, when the suit was before him, he would not accept the statute of limitations as a measure of time where it would be inequitable to do so. The facts which would induce the chancellor to reach this result in equity when the whole case was before him, were just the same as when the action had been brought at law and the only relief sought from the chancellor was relief against the defense of limitations because of the defendant's inequitable conduct.

However, the passage of time created confusion as to the content of this phase of the doctrine of laches, and it resulted in a neologism which ascribed to the doctrine of laches the content of the old equitable bill to relieve against fraud and inequitable conduct *in all cases even where no such special circumstances*

[16] See, generally on this subject, Dawson, Fraudulent Concealment and Statutes of Limitation, 31 Mich. L. Rev. 875 (1933).

[17] *Russell* v. *Todd*, 309 U. S. 280, 288.

existed. It was somehow felt that in equity the doctrine of laches even *in ordinary cases*, permitted the chancellor to disregard entirely periods of limitation otherwise applicable if the suit were brought at law.

In *Kirby* v. *Lake Shore & Michigan Southern Railroad*, 120 U. S. 130 (1887), the Court—leaving aside for the moment the impact of the Rules of Decision Act—properly applied the doctrine of laches.[18] There the local period of limitations was disregarded because of the defendant's inequitable conduct. The Court said (at p. 136):

> "* * * it is an established rule of equity, as administered in the courts of the United States, that, where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered. *Meader* v. *Norton*, 11 Wall. 442, 458; *Prevost* v. *Gratz*, 6 Wheat. 481; *Michoud* v. *Girod*, 4 How. 503, 561; *Veazie* v. *Williams*, 8 How. 134, 149, 158; *Brown* v. *Buena Vista*, 95 U. S. 157; *Rosenthal* v. *Walker*, 111 U. S. 185, 190; 2 Story Eq. §1521a; Angell on Limitations."

Guaranty Trust Co. v. *York*, expounding the present view of section 34 of the Judiciary Act of 1789, adumbrated in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, holds that in cases which come to the federal court solely

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[18] The admiralty cases have stated the rule in the same terms. See, *e. g.*, *The Key City*, 81 U. S. 653 (1871); *Christianson* v. *Western Pacific Packing Co.*, 24 F. Supp. 437, 439 (W. D. Wash. 1938); *Pan-American Trading Co.* v. *Franquiz*, 8 Fed. (2) 500, 501 (S. D. Fla. 1925); *The Southwork*, 128 Fed. 149 (E. D. Pa., 1904); *cf. Davis et al.* v. *Smokeless Fuel Co.*, 196 Fed. 753 (C. C. A. 2nd 1912).

by reason of the diversity of citizenship of the parties and where the federal court is sitting as an alternative state tribunal, the state's view as to laches and limitations must be applied. Thus, if the state court would not apply the old equitable bill to relieve against fraud or inequitable conduct in interpreting state statutes of limitation the federal court may not do so.

We thus see that:

1. A federal court expounding a federal jurisprudence will *in law actions* apply state limitations where Congress has not acted.[19]

2. A federal court expounding a federal jurisprudence will *in law actions* apply federal limitations where Congress has created such limitations. (*Herget* v. *Central National Bank & Trust Co., supra; Meeker* v. *Lehigh Valley R. R.*, 236 U. S. 412, 423 (1915).)

3. A federal court expounding a federal jurisprudence will in applying federal statutes of limitation invoke the ancient equitable bill to relieve against fraud or inequitable conduct in a proper case.[20] It will do so *in a law action* by allowing such facts to be pleaded as a replication to the defense of limitations.

Indeed it must follow that where a federal court is expounding a federal jurisprudence it will, when the case is of equitable cognizance, grant the same relief against inequitable conduct which is comprised in the doctrine of *Bailey* v. *Glover*, and which was

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[19] See cases cited in note 11, *supra*.

[20] *Bailey* v. *Glover*, *supra*; *Rosenthal* v. *Walker*, 111 U. S. 185; *Tracy* v. *Clews*, 115 U. S. 528; *Exploration Co.* v. *United States*, 247 U. S. 435 (1918); *United States* v. *Diamond Coal Co.*, 255 U. S. 323 (1921); see *Avery* v. *Cleary*, 132 U. S. 604; cf. *Upton* v. *McLaughlin*, 105 U. S. 640.

correctly stated (the rule in diversity cases to the contrary notwithstanding) in *Kirby* v. *Lake Shore etc. R. R.* Accordingly, if Congress grants a right and confers primary jurisdiction to enforce that right on a federal court of equity, facts showing a defendant's inequitable conduct will be a proper reply to a defense that the action was not commenced within the time limited by a state, not a federal statute of limitations. It would be anomalous to hold *now* that the equitable power to relieve against fraud and inequitable conduct which was used by the Court as the basis for justifying a replication to the defense of limitations in *Bailey* v. *Glover*, does not exist in a federal equity court, the original source of that power.

Nor does *Campbell* v. *Haverhill* destroy the soundness of this conclusion. Although that case was said to be based on the Rules of Decision Act, it does not depend on that statute. As this Court recently said in *Russell* v. *Todd*, it would in the absence of a controlling act of Congress "without reference to the Rules of Decision Act adopt and apply local statutes of limitation which are applied to like causes of action by the state courts."

Nor does *Erie* v. *Tompkins* purport to destroy this power. Insofar as that case was based on the Rules of Decision Act, it was intended only to apply to diversity cases; and the recurring note in *Guaranty Trust Co.* v. *York* is that in *diversity* cases only must a federal equity court adopt the local rules as to limitations.

We understand these cases to establish this rule: In the ordinary case the federal court will take the state statute of limitations as the measure of time, both at law and in equity. However, the power which a federal equity court has, when expounding a primary

federal jurisprudence, to relieve against fraud and inequitable conduct in special cases still exists.

We do not think that it makes any substantial difference on what ground the federal court's power to relieve against fraud or other inequitable conduct is based when that power involves cases which are purely federal and which do not come to the federal courts on diversity grounds. It may be based on historical and constitutional grounds; it may be said to be found in the Rules of Decision Act insofar as that Act specifically excepts from its ambit cases where the "constitution * * * or statutes of the United States otherwise require and provide. * * *"

Or this rule may be predicated on the principle that in exclusively federal matters where a federal policy expressed in a federal statute would be nullified by state rule or decision the latter cannot stand. Indeed, this Court has refused to permit state statutes of limitation to affect federal power whenever conflict between the two arose. When the question was as to the accrual of a cause of action granted by a federal statute for the purpose of deciding when a state limitation statute began to run thereon, this Court refused to be bound by state decisions interpreting the state limitation statute. (*Rawlings* v. *Ray*, *supra*.) When the question was as to when the Comptroller of the Currency should have levied an assessment for the purpose of determining the application of a state limitation statute, this Court again struck down a state decision abridging the federal power (*Rankin* v. *Barton*, 199 U. S. 228).

These decisions reflect the principle that in purely federal matters state law is not controlling. Recent illustrations will be recalled. For example, a state can provide for the insulation of liability of stock-

holders through the corporate form. Yet, when this interfered with the effective enforcement of the assessment liability of stockholders of national banks, the state law was brushed aside.[21] We can see no substantial difference between a state statute of limitations and a state statute which permits the insulation of stockholders from the liability created by a federal assessment statute. If either state statute conflicts with the policy expressed in the federal statute, it will not stand.

At this point it may be noted that it makes no difference in substance whether the result in a particular case is reached as an exegesis on the policy of a particular federal statute or whether it is derived from an interpretation of the Rules of Decision Act. In a proper case the one will involve the other. All we desire to point out now is that in view of the recent statements of this Court in, *e. g.*, *D'Oench Duhme & Co.* v. *F. D. I. C.*; *Clearfield Trust Co.* v. *U. S.*; *Anderson* v. *Abbott*; *Sola Electric Co.* v. *Jefferson Co.*,[22] as to the ambit of federal power it would be inadvisable to consider the Rules of Decision Act as stating an imperative proposition for *all* cases without regard to the facts of particular cases as each one may arise.

We can envisage a case in which the congressional policy established in a federal statute requires the investigation and prosecution of corporate frauds; we can further see that in such a case the Congress may have vested jurisdiction of the suit primarily in a federal equity court. We can understand how in such a case frauds may be discovered for the first time long after the wrongs have occurred because the defendants concealed their own wrongful acts. We can see how in such a case the defendants may attempt to rely on

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[21] *Anderson* v. *Abbott*, 321 U. S. 349 (1944).

[22] Cited in note 24, *infra*.

state limitation statutes. A state limitation statute applied in such a case would nullify the policy of the federal statute as effectively as the state incorporation statute would have done in *Anderson* v. *Abbott*. The mere fact that in the one instance the nullification of federal policy is accomplished by a state limitation statute should not alter the principle that a federal policy, federally expressed, will override state statutes.

On the other hand, state limitation statutes may ordinarily be applied to federal rights. Thus there may be a case in which no conflict between federal power and state limitation statutes exists and in such a case, the state limitation statute would apply. That would not mean that in a subsequent case such a conflict might not arise requiring the state law to bow to the federal policy expressed in the federal statute. Therein lies our dispute with the views of the Court of Appeals. Since a federal statute and the federal policy embodied therein are involved it was incumbent on the Court below to investigate those matters and to discuss their bearing on the issue. Thus the accrual of the cause of action here is a federal matter. The existence of the special circumstances relied on by the petitioners as removing the case from the bar of the state limitation statutes is a federal matter affecting the policy of the federal statute. The Court of Appeals did not discuss these matters because it deemed them irrelevant in view of its opinion of the scope of the rule thought to have been laid down in *Guaranty Trust Co.* v. *York*. We do not believe that the *Guaranty* case went so far. We believe that it is still incumbent on the federal court to determine whether, in view of the policy[23] contained in the federal statute here involved, an actual owner of the stock

[23] See discussion *supra*, p. 11 *et seq.*

of the land bank could for example avoid liability because of the ignorance of the creditors of the bank of the existence of the defendant's stockholder status. It may be pertinent to the federal policy expressed in the federal assessment statute to decide whether actual owners of stock can escape liability by permitting their stock to be carried in such a way on the books of the bank as to prevent discovery of their status until after limitations of time otherwise applicable have run.

It will be recalled that in *Anderson* v. *Abbott*, the formation of the holding company to hold the stock of a national bank was accomplished without any fraud. Yet, the Court, to effectuate the policy of the federal statute struck down the state-created corporation as a device for insulation from federal liability. So here, even though actual owners may, without fraud and in the regular course of business, permit their stocks to be registered on the books of the bank in the names of nominees, still in the effectuation of a federal policy it may well be held that the statute of limitations as to them does not begin to run until their stockholders' status is discovered.

This literal view of the scope of the rule in *Guaranty Trust Co.* v. *York* raises the second question which we adverted to at the outset of this discussion and which we believe is presented by the record: Suppose Congress creates a right but fails to confer jurisdiction on the federal courts to hear the case save as such jurisdiction may be invoked on the ground of diversity of citizenship of the litigants; in such a case is the federal court expounding a federal jurisprudence or is it, within the view of *Guaranty Trust Co.* v. *York*, sitting as an alternative state tribunal?

We leave to one side the fact that the *construction* of the federal statute raises and presents a federal question as to which the federal courts have the supreme power.[24] We are concerned only with this question: does the fact that the right was created by Congress, although the enforcement was left to the state courts (except in diversity cases), alter the rule laid down in *Guaranty Trust Co.* v. *York?*

The record discloses that in the instant case Congress created the right: the cause of action to recover the stock assessment liability of the stockholders of the bank (12 U. S. C. §812). The Court has said that this right may be enforced only in a court of equity (*Wheeler* v. *Greene, supra*). But it is not at all clear that Congress granted jurisdiction—apart from diversity—to the federal courts.

That the original liquidation suit in Minnesota would have presented a case "arising under the laws of the United States, and of which independently of the matter of diverse citizenship the (federal) Court

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[24] The following is offered only as a *partial* list of the more recent cases where this Court has expounded this doctrine: *Dietrick* v. *Greeney*, 309 U. S. 190, 200, 201; *D'Oench Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447 (1942); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943); *United States* v. *Allegheny County*, 322 U. S. 174, 183 (1944); *Anderson* v. *Abbott*, 321 U. S. 349, 365 (1944); *Smith* v. *Allwright*, 321 U. S. 649 (1944); *Estate of Rogers* v. *Commissioner*, 320 U. S. 410, 414 (1943); *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173 (1942); *Rawlings* v. *Ray*, 312 U. S. 96; *Fisher* v. *Whiton*, 317 U. S. 217 (1942); *Wragg* v. *Federal Land Bank of New Orleans*, 317 U. S. 325, 328 (1943); *United States* v. *Miller*, 317 U. S. 369, 379 (1943); *Standard Oil Company* v. *Johnson*, 316 U. S. 481 (1942); *United States* v. *Pink*, 315 U. S. 203, 217 (1942); *Irving Trust Company* v. *Day*, 314 U. S. 556, 561 (1942); *Kalb* v. *Feuerstein*, 308 U. S. 433, 438 (1940).

had jurisdiction * * *" is clear if a national bank were involved.[25] Whether that applies to the liquidations of federal land banks is not so clear. The federal incorporation of the land bank no longer is sufficient basis for access to the district courts.[26] Although one case has held that the rule in *Wyman* v. *Wallace* applies to liquidations of land banks[27] its discussion of this point does not dispel all doubt[28] especially in view of the more recent views of this Court as to when a case "arises" under federal law.[29]

In the case of *national* banks, Congress has specially conferred jurisdiction upon the district courts of all "cases for the winding up of the affairs of any such bank".[30] But no such grant appears with respect to *land banks* and it does not seem likely that the specific language in the statute will be deemed wide enough to apply to them.

When we come to the enforcement of the assessment liability we find that Congress has not specifically granted federal jurisdiction in cases involving the enforcement of the stock assessment liability of federal land bank stockholders. In the case of national banks the federal court's jurisdiction has been accepted as properly based on the federal nature of the

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[25] *Wyman* v. *Wallace*, 201 U. S. 230, 242 (1906); voluntary liquidation of a national bank.

[26] 28 U. S. C. A. §42.

[27] *Brusselback* v. *Chicago Joint Stock Land Bank*, 85 Fed. (2d) 617 (C. C. A., 7th, 1936).

[28] *Wyman* v. *Wallace*, note 25, *supra*, would seem to rest more appropriately on the express grant of jurisdiction contained in the sixteenth, rather than the first, subdivision of Judicial Code, §24; See discussion in *Lawrence Nat. Bank* v. *Rice*, 83 Fed. (2d) 642 (C. C. A., 10th, 1936).

[29] See, *e. g.*, *Gully* v. *First Nat. Bank*, 299 U. S. 109, 112, *et seq.*

[30] 28 U. S. C. A. §41 (16).

office which the receiver, the enforcing officer, holds.[31] No such parallel can be found in land bank liquidations. Indeed the Court of Appeals for the Tenth Circuit has held[32] that in the closely analogous case of the voluntary liquidation of a national bank the members of its liquidating committee are not "officers of the United States" within the meaning of Judicial Code §24. But no definitive ruling appears to exist. The decisions in the various lower federal courts are confusing on the point; indeed counsel have reflected the uncertainty by invoking diversity of citizenship as a ground for jurisdiction.[33]

If we are correct in assuming that, although Congress created the right, it left its enforcement to state courts (save in diversity cases), the question remains as to whether the fact that the right was federally created should alter the rule in *Guaranty Trust Co.* v. *York*. The Court of Appeals did not think so.

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[31] *Pufahl* v. *Parks' Estate*, 299 U. S. 217, 225 (1936).

[32] *Lawrence Nat. Bank* v. *Rice*, 83 Fed. (2) 642 (1936).

[33] *Cf. Brusselbach* v. *Cago Corp.*, 14 F. Supp. 993 (S. D. N. Y. 1936) (diversity and federal question involved; no comment by Court); *Lincoln Nat. Bank, etc.* v. *De Courtney*, 14 F. Supp. 997 (S. D. N. Y., 1931) (same); *Partridge* v. *Ainley*, 28 F. Supp. 472 (S. D. N. Y., 1939) (statement that case arises under federal law, without discussion); *Brusselbach* v. *Cago Corp.*, 24 F. Supp. 524 (S. D. N. Y., 1938) (same); *Holmberg* v. *Ancheff*, 24 F. Supp. 594 (S. D. N. Y., 1938) (same); *Holmberg* v. *Hannaford*, 28 F. Supp. 216 (S. D. Ohio, W. D., 1939) (no discussion); *Brusselbach* v. *Arnovitz*, 87 Fed. (2) 761 (C. C. A. 6, 1936) (diversity alleged; no comment by Court); *Brusselbach* v. *Cago*, 85 Fed. (2) 20 (C. C. A. 2, 1936) (no comment on point); *Todd* v. *Russell*, 104 Fed. (2) 169 (C. C. A. 2nd, 1939) (diversity and federal question, no comment by Court). If the original liquidation in Minnesota is properly bottomed on a federal jurisdiction which exists apart from the diversity of the citizenship of the parties, then the point suggests itself as to whether the jurisdiction in New York could in some way be bottomed primarily in the federal court on the doctrine of ancillarity (*Cf. Richle* v. *Margolies*, 279 U. S. 218, 223).

Perhaps, apart from the policy of the federal statute,[34] the rule of *Guaranty Trust Co.* v. *York* should apply. However, there is the question of the policy of the federal statute. There is, further, the question raised by the petitioners as to whether the state statute should be applied because of the special circumstances urged by them. It is our view that it was error for the Court below to have decided this case by a literal application of *Guaranty Trust Co.* v. *York* without any consideration of these various matters.

Respectfully submitted,

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[34] See discussion, *supra*, pp. 11 *et seq.*